

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>EON J &amp; P CORP.</b>	:	DETERMINATION
	:	DTA NO. 819614
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1998 through May 31, 2001.	:	

---

Petitioner, Eon J & P Corp., 142-20 Franklin Avenue #4H, Flushing, New York 11355, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1998 through May 31, 2001.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 27, 2004 at 10:30 A.M., with all briefs to be submitted by July 14, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jinsoo Jeon, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

***ISSUE***

Whether petitioner, as a bulk sale purchaser under Tax Law § 1141(c), is liable for sales and use taxes due from the bulk sale seller.

***FINDINGS OF FACT***

1. On May 8, 2002, Bernard & Varecha Deli, Inc. sold its business, The Woodbury Deli, including all tangible personal property, inventory, goodwill and an assignment of a lease, to petitioner, EON J & P Corp., for \$90,000.00.

2. The lease assigned in the transaction was between Holly Nolan (for Thomas Klemenko), landlord, and Richard Varecha and Josephine Bernard, tenants, dated June 1, 1996. The term of the lease was July 1, 1996 through the end of June 2006. The lease provided that it could not be assigned without the prior written consent of the landlord, and any attempt to do so would be void and terminate the lease. Said consent was not obtained by the bulk sale seller and the landlord terminated the lease and took possession of the premises after petitioner had been operating the business for only two months.

3. Also on May 8, 2002, the date of the bulk sale, petitioner sent a Notification of Sale, Transfer or Assignment in Bulk, form AU-196.10, to the Division of Taxation ("Division"), informing the Division of the sale. The form provided that it was to be sent to the Division by registered mail 10 days prior to taking possession of or paying for the business or property, whichever occurred first.

4. The notification form in evidence indicates that it was received by the Division on May 14, 2002, six days after the sale date specified on the bill of sale and the notification form.

5. On May 30, 2002, the Division sent a Notice of Claim to Purchaser to petitioner, which served notice of a possible claim for unpaid sales and use taxes due from the seller and stated, in pertinent part:

You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the state's claim, may be made before the following conditions have been met:

1. The Department of Taxation and Finance has determined the seller's liability, if any.
2. Payment of such liability has been made to the department (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law).
3. This office has authorized you to release the funds or property.

Please note that failure to comply with this notice subjects you to personal liability for any sales tax deficiency determined to be due from the seller.

The form also noted that \$247.50 had been received by the Division as sales and use taxes due on the transfer of the tangible personal property.

6. By letter dated June 3, 2002, the Division informed petitioner that it had received the notification of sale and that pursuant to Tax Law § 1141(c) petitioner might be liable for sales and use taxes due from the seller, Bernard & Varecha Deli, Inc. In addition, it disclosed to petitioner that Bernard & Varecha Deli, Inc. owed \$143,300.00.

7. Also on June 3, 2002, the Division mailed to Bernard & Varecha Deli, Inc. a “Notice to the Seller,” in which it requested a copy of the sales contract with regard to the bulk sale, the final sales tax return for the period ended March 1, 2002, books and records pertinent to the business operations and payment for all open assessments.

8. The Division issued to petitioner a Notice of Determination, dated July 29, 2002, which set forth additional sales and use taxes due of \$81,171.13 for the period September 1, 1998 through May 31, 2001. The notice explained that it had been issued to petitioner as a bulk sale purchaser liable for the tax pursuant to Tax Law § 1141(c) and §1138(a)(3).

9. After a conference in the Bureau of Conciliation and Mediation Services held on January 30, 2003, the tax was reduced to \$67,997.03 and the Notice of Determination was so modified by a conciliation order issued on June 27, 2003.

### ***CONCLUSIONS OF LAW***

A. Section 1141(c) of the Tax Law provides, in pertinent part, as follows:

Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the

seller, transferor or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give notice to the tax commission as required by the preceding paragraph, or whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferor or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferor or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferor or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim . . . . For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article.

In this case, the evidence demonstrated that petitioner failed to notify the Division ten days prior to the sale. The notification was dated May 8, 2002, the same day as the sale and was received by the Division on May 14, 2002. Petitioner's failure to timely file the notice subjected it to liability for payment of the seller's unpaid sales and use taxes to the extent of the higher of the purchase price or the fair market value of the assets sold, in this case \$90,000.00. (Tax Law § 1141[c]; *Harcel Ligs. v. Evsam Parking*, 48 NY2d 503, 423 NYS2d 873, 875).

Pursuant to Tax Law § 1141(c), the Division of Taxation gave notice to petitioner of the amount of tax it owed.

B. Petitioner argues that it does not owe the tax because the seller did not properly assign the lease to the business premises, as specified in the bill of sale. However, this does not

alter the fact that a bulk sale took place on May 8, 2002, as that term is defined in the regulations, to wit:

(a) Bulk Sale. (1) the term ‘bulk sale’ as used in this Part means, any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance. (20 NYCRR 537.1[a][1].)

Clearly, the bill of sale and notification of sale in bulk evidence that the assets of the business were transferred from Bernard & Varecha Deli, Inc. to petitioner for cash consideration of \$90,000.00. The seller’s inability to assign the lease may very well have constituted a breach of contract subjecting it to damages, but said failure did not change the character of the transaction as a bulk sale or relieve petitioner from its responsibility for the taxes due pursuant to Tax Law § 1141(c).

Although petitioner argues that it had no knowledge of the seller’s inability to assign the lease and was severely injured by its actions, the reasonable and prudent purchaser would have reviewed the lease and obtained the consent of the landlord before consummating the bulk sale and taking possession of the premises. Petitioner did not exercise due diligence in consummating the sale before examining the lease and confirming its rights thereunder.

Petitioner took immediate possession of the business and all its inventory, fixtures, equipment, real estate and goodwill and operated the business for two months. There is no evidence in the record that any assets transferred to petitioner pursuant to the bill of sale were returned to the seller. In short, all of the evidence indicates that a sale transaction was consummated on May 8, 2002, as intended by the parties, and that sale has not been canceled or rescinded.

C. There is no dispute that petitioner has incurred substantial monetary damages because of the seller’s breach and petitioner’s failure to follow the statutory requirements for bulk sale

purchasers. However, the statute provides more than adequate protection to prospective purchasers, who need only to inform the Division of the expected sale in order to protect themselves from liability.

Nor is it a valid defense that the Division should seek payment of the taxes from the seller first, since petitioner is jointly and severally liable for the taxes due by virtue of the provisions of Tax Law § 1141(c). (*Matter of Hurley*, Tax Appeals Tribunal, July 16, 1998.)

It is concluded that petitioner did not meet its burden of proving that the assessment issued to it was not correct. (20 NYCRR 537.8[c].)

D. The petition of EON J & P Corp. is denied, and the notice of determination, dated July 29, 2002, as modified by the Bureau of Conciliation and Mediation Services order, is sustained.

DATED: Troy, New York  
October 7, 2004

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE